

1 THE HONORABLE JAMES L. ROBART
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CYWEE GROUP LTD.,

11 v.
12 Plaintiffs,

13 HTC CORPORATION, and HTC AMERICA,
14 INC.,

15 Defendants.

16 HTC CORPORATION, and HTC AMERICA,
17 INC.,

18 v.
19 Third-Party Plaintiffs,

20 STMICROELECTRONICS N.V.,
21 STMICROELECTRONICS, INC., and CYWEE
22 MOTION GROUP LTD.,

23 v.
24 Third-Party Defendants.

25 CASE NO.: 2:17-cv-00932-JLR

26 DEFENDANTS' MOTION TO
27 AMEND SCHEDULING ORDER

28 NOTE ON MOTION CALENDAR:
APRIL 13, 2018

JURY TRIAL DEMANDED

DEFENDANTS' MOTION TO AMEND
SCHEDULING ORDER
2:17-CV-00932-JLR

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Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure and LCR 16(b)(5), Defendants HTC Corporation (“HTC Corp.”) and HTC America, Inc. (“HTC America”) (collectively, “HTC”) hereby move the Court to amend the case schedule provided in the Minute Order Setting Trial Dates and Related Dates (Dkt. # 42) (“Scheduling Order”). Specifically, HTC requests that the Court extend all case deadlines prior to the deadline to file dispositive motions in order to account for the addition of third-party defendants to this action following issuance of the Scheduling Order, (*see* Dkt. # 43), and to afford all third-party defendants the opportunity to participate in claim construction proceedings.

I. BACKGROUND

The Court issued its Scheduling Order in this case on December 14, 2017. (*See* Dkt. # 42.) At the time, the only parties in the case were HTC and Plaintiff CyWee Group Ltd. (“CyWee”). On January 11, 2018, however, HTC filed a Third-Party Complaint against STMicroelectronics N.V. (“STM N.V.”), STMicroelectronics, Inc. (“STM, Inc.”), and CyWee Motion Group Ltd. (“CyWee Motion”). (*See* Dkt. # 43.) In conjunction with its Third-Party Complaint, HTC filed three Praecipes to Issue Summons: one as to STM N.V., a corporation organized and existing under the laws of the Netherlands, (*see* Dkt. # 44); one as to STM, Inc., a Delaware corporation with a registered agent in the State of Washington, (*see* Dkt. # 45); and one as to CyWee Motion, a corporation organized and existing under the laws of Taiwan, (*see* Dkt. # 46). On January 16, 2018, the Clerk of Court issued the aforementioned summonses. (*See* Dkt. # 47.) HTC served STM, Inc. with the Third-Party Complaint and corresponding summons on January 19, 2018. (*See* Dkt. # 50.)

Thus far, however, HTC has been unable to effectuate service with respect to STM N.V. and CyWee Motion. (*See* Yoon Decl.¹ at ¶ 8.) Because STM, Inc. is a wholly owned subsidiary of STM N.V., (*see* Dkt. # 53), and CyWee is an affiliate of CyWee Motion, (*see* Yoon Decl. at ¶ 4), counsel for HTC initially met and conferred with counsel for STM, Inc. and counsel for

¹ “Yoon Decl.” refers to the concurrently filed Declaration of James C. Yoon.

1 CyWee regarding acceptance of service on behalf of STM N.V. and CyWee Motion,
 2 respectively, (*see id.* at ¶¶ 4-5). Specifically, counsel for HTC met and conferred with counsel
 3 for STM, Inc. on February 14, 2018. (*See id.* at ¶ 5.) And counsel for HTC met and conferred
 4 over several conversations and email communications with counsel for CyWee starting on
 5 January 12, 2018. (*See id.* at ¶ 4.) Neither STM, Inc. nor CyWee, however, agreed to accept
 6 service on behalf of its affiliate. (*See id.* at ¶¶ 4-5.)

7 After its efforts to informally negotiate acceptance or waiver of service failed, HTC
 8 retained the services of TransPerfect Legal Solutions (“TransPerfect”), a firm that specializes in
 9 translation of documents and foreign service of process, on March 7, 2018 . (*See id.* at ¶ 6.)
 10 TransPerfect subsequently enlisted the assistance of Celeste Ingalls, a specialist in the service of
 11 foreign process. (*See* Ingalls N. Decl.² at lines 1-3, ¶¶ 1-2; Ingalls T. Decl.³ at lines 1-3, ¶¶ 1-
 12 2.) As Netherlands is a signatory to the Convention on the Service Abroad of Judicial and
 13 Extrajudicial Documents in Civil or Commercial Matters, Done at The Hague, November 15,
 14 1965 (“the Hague Service Convention”), (*see* Ingalls N. Decl. at ¶ 3), Ms. Ingalls recommended
 15 that service as to STM N.V. be completed in accordance with the Hague Service Convention,
 16 (*see id.* at ¶¶ 4-11). This process generally takes three to four months to complete, but can
 17 occasionally exceed six months. (*See id.* at ¶ 12.) Taiwan, on the other hand, is not a signatory
 18 to the Hague Service Convention. (*See* Ingalls T. Decl. at ¶ 3.) As such, Ms. Ingalls
 19 recommended that service as to CyWee Motion be completed via letter rogatory service, (*see*
 20 *id.* at ¶¶ 4-12), which generally takes a minimum of six months to complete, but could exceed a
 21 year, (*see id.* at ¶ 13). Ms. Ingalls commenced with the proper procedures to properly and
 22 formally effect service of process on STM N.V. and CyWee Motion on March 20, 2018. (*See*
 23 Ingalls N. Decl. at ¶ 3; Ingalls T. Decl. at ¶ 3.)

25 ² “Ingalls N. Decl.” refers to the concurrently filed Declaration of Celeste Ingalls Regarding
 26 Service of Process in the Netherlands.

27 ³ “Ingalls T. Decl.” refers to the concurrently filed Declaration of Celeste Ingalls Regarding
 28 Service of Process in Taiwan.

In light of the above, it is likely⁴ that STM N.V. and CyWee Motion will not be served until the deadline for service of summons and third-party complaint has passed and claim construction proceedings are either well underway or complete. (*Compare* Ingalls N. Decl. at ¶ 12 (estimating service time of three to four months in the Netherlands), *and* Ingalls T. Decl. at ¶ 13 (estimating service time of at least six months in Taiwan), *with* Dkt. # 42.) Accordingly, HTC requests that the Court extend HTC's deadline for service of summons and third-party complaint and delay claim construction proceedings to the extent possible,⁵ so that all third-party defendants—who may be bound by the Court's determinations—have the opportunity to participate. Specifically, HTC proposes the following schedule:

Event	Current Deadline	Proposal
HTC's Deadline for Service of Summons and Third-Party Complaint	April 11, 2018	October 11, 2018
Joint Claim Chart and Prehearing Statement	April 25, 2018	July 27, 2018
Opening Claim Construction Briefs	May 18, 2018	August 2, 2018
Responsive Claim Construction Briefs	June 1, 2018	August 16, 2018
<i>Markman</i> Hearing (9:00 AM)	July 13, 2018	September 21, 2018 (Subject to the Court's availability)
Initial Expert Reports	August 24, 2018	October 23, 2018

⁴ On March 16, 2018, HTC sent letters to STM N.V. and CyWee Motion requesting that they waive service pursuant to Rule 4(d)(1)(D) of the Federal Rules of Civil Procedure. (*See* Yoon Decl. at ¶¶ 9-10.) To date, however, HTC has received no indication that either entity is inclined to do so. (*See id.*)

⁵ HTC is mindful of this Court's decisions reflecting its preference for (1) a 35-day time period between the deadline for completing claim construction briefing and the *Markman* hearing, *see Microsoft Corp. v. Motorola, Inc.*, No. 2:10-cv-00230-JLR, slip op. at 2 (W.D. Wash. Sept. 29, 2011) (Robart, J.), (2) a discovery cut-off that precedes the deadline for filing dispositive motions, so that the record is complete when the Court considers such motions, *see Hawkins v. United States*, No. C16-0498JLR, 2017 U.S. Dist. LEXIS 79800, at *3-4 (W.D. Wash. May 24, 2017) (Robart, J.) (extending the discovery cut-off date to June 20, 2017, in view of the June 27, 2017 deadline for filing dispositive motions), and (3) a 105-day time period between the deadline for filing dispositive motions and the trial date, *see Pac. Bioscience Labs., Inc. v. Nutra Luxe MD, LLC*, No. 2:10-cv-01823-JLR, slip op. at 2 (W.D. Wash. Apr. 2, 2012) (Robart, J.).

Event	Current Deadline	Proposal
Rebuttal Expert Reports	September 21, 2018	November 8, 2018
Deadline to Amend Pleadings	September 26, 2018	November 13, 2018
Deadline to Note Discovery Motions	October 5, 2018 [No later than the Friday before discovery closes]	November 16, 2018 [No later than the Friday before discovery closes]
Close of Discovery	October 12, 2018	November 19, 2018
Deadline to File Dispositive Motions	November 20, 2018	November 20, 2018
Deadline to Note Dispositive Motions	December 14, 2018 [No later than fourth Friday after filing]	December 14, 2018 [No later than fourth Friday after filing]
Deadline to hold Settlement Conference per CR 39.1(c)(2)	December 21, 2018	December 21, 2018
Deadline to File Motions <i>in Limine</i>	February 22, 2019	February 22, 2019
Deadline to Note Motions <i>in Limine</i>	March 8, 2019 [No later than second Friday after filing]	March 8, 2019 [No later than second Friday after filing]
Pretrial Order	March 7, 2019	March 7, 2019
Pretrial Conference (2:00 PM)	March 11, 2019	March 11, 2019
Trial Briefs, Proposed <i>Voir Dire</i> Questions and Jury Instructions	March 18, 2019	March 18, 2019
Trial (7-8 days)	March 25, 2019	March 25, 2019

II. LEGAL STANDARD

Under Rule 16(b)(4) of the Federal Rules of Civil Procedure, “[a] schedule may be modified only for good cause and with the judge’s consent.” *See also* LCR 16(b)(5). “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992). In other

words, “[t]he district court may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party seeking the extension.” *Id.* (internal quotation and citations omitted). Finally, “[a]lthough the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking modification.” *Id.* (citation omitted).

III. ARGUMENT

In accordance with the good cause standard of Rule 16, HTC has diligently pursued informally negotiating acceptance or waiver of service for third-party defendants STM N.V. and CyWee Motion. Despite its efforts, however, the service process may not be completed for several months. Accordingly, there is good cause for the requested relief, which HTC diligently requested. Furthermore, any prejudice that CyWee and STM, Inc. might experience if HTC’s proposed schedule is adopted—a subordinate consideration in the evaluation of good cause in the first place—would be minimal.

1. There Is Good Cause to Amend the Scheduling Order

As the Ninth Circuit has made clear, “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson*, 975 F.2d at 609. HTC has diligently sought to serve the foreign third-party defendants in this case. The Clerk of Court issued summonses as to third-party defendants STM, Inc., STM N.V., and CyWee Motion on January 16, 2018. (*See* Dkt. # 47.) On January 19, 2018, merely three days later, HTC served STM, Inc. with the Third-Party Complaint and corresponding summons. (*See* Dkt. # 50.) The summons was returned executed and entered by the Court on January 29, 2018. (*See id.*) During this time, HTC initiated meet and confer efforts to investigate the possibility of CyWee accepting service on behalf of its affiliate, CyWee Motion. (*See* Yoon Decl. at ¶ 4.) And once STM, Inc. was properly a party to the case, HTC promptly initiated meet and confer efforts to investigate the possibility of STM, Inc. accepting service on behalf its affiliate, STM N.V. (*See id.* at ¶ 5; Dkt. # 53.) When informal negotiations failed, (*see* Yoon Decl. at ¶¶ 4-5), HTC sought the assistance of a company that specialized in providing foreign service of process, and ultimately

1 enlisted the services of TransPerfect on March 7, 2018, (*see id.* at ¶ 6). On March 20, 2018,
 2 TransPerfect instructed Ms. Ingalls to initiate the proper procedures to effect service of process
 3 upon CyWee Motion and STM N.V. (*See* Ingalls N. Decl. at ¶ 2; Ingalls T. Decl. at ¶ 2.)
 4 Pursuant to Ms. Ingalls' recommendations regarding service of CyWee Motion, (*see* Ingalls T.
 5 Decl. at ¶¶ 6-12), HTC filed a Motion for Issuance of a Request for International Judicial
 6 Assistance (Letter Rogatory) on March 29, 2018, (*see* Dkt. # 67). And with respect to STM
 7 N.V., HTC expects that the requisite service documents will be ready to send to the appropriate
 8 authority in the Netherlands, in accordance with the Hague Service Convention, on March 30,
 9 2018. (*See* Ingalls N. Decl. ¶ 11.) In short, although effectuating foreign service is a multi-step
 10 process, (*see id.* at ¶¶ 2, 8-11; Ingalls T. Decl. at ¶¶ 2, 6-12), HTC has diligently progressed
 11 through those steps to date.

12 HTC was also diligent in filing the instant motion. To wit, it filed the instant motion one
 13 day after satisfying its latest obligation to effectuate service on CyWee Motion in Taiwan, (*see*
 14 Dkt. # 67), and on the same day that it anticipates sending the requisite service documents to the
 15 appropriate authority in the Netherlands, in furtherance of its efforts to serve STM N.V., (*see*
 16 Ingalls N. Decl. ¶ 11).

17 In light of HTC's diligence, there is good cause to amend the Scheduling Order as HTC
 18 has proposed. If the schedule is not so amended, it is likely that the lengthy process
 19 requirements for foreign service will prevent HTC from serving STM N.V. and CyWee Motion
 20 until the deadline for service of summons and third-party complaint has passed. Furthermore,
 21 third-party defendants STM N.V. and CyWee Motion would likely be deprived of the
 22 opportunity to participate in claim construction proceedings. Courts in this Circuit have found
 23 good cause in similar circumstances. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No.
 24 C 10-3724 CW, 2013 U.S. Dist. LEXIS 113551, at *31 (N.D. Cal. Aug. 7, 2013) (“Allowing [the
 25 plaintiff] to assert infringement contentions against [the third-party defendant] now would be
 26 unduly prejudicial because, among other things, [the third-party defendant] would be deprived of
 27 the opportunity to participate in the claim construction proceedings that have already taken place

1 and the dispositive summary judgment that is now pending.”); *Victor Co. of Japan, Ltd. v.*
 2 *Quanta Comput., Inc.*, No. C 06-04222 WHA, 2007 U.S. Dist. LEXIS 21263, at *6-7 (N.D. Cal.
 3 Mar. 15, 2007) (“[The third-party defendant] has demonstrated that it cannot, despite diligently
 4 pursuing its defenses, sufficiently develop non-infringement and invalidity positions to exchange
 5 preliminary claim constructions by the end of this month. . . . Accordingly, [the third-party
 6 defendant’s] proposed schedule will be adopted for dates up to and including the claim-
 7 construction hearing.”); *cf. Estate of Powell v. Barnes*, No. C16-0352JLR, 2017 U.S. Dist.
 8 LEXIS 9923, at *5 (W.D. Wash. Jan. 24, 2017) (Robart, J.) (quoting *McFall v. Stacy & Witbeck,*
 9 *Inc.*, No. 14-CV-04150-JSC, 2016 U.S. Dist. LEXIS 64303, at *10-11 (N.D. Cal. May 16, 2016))
 10 (“Given that the [c]ourt has granted [the parties’ stipulated] motion to amend the complaint to
 11 add . . . new part[ies] . . . , there is necessarily good cause to amend the scheduling order with
 12 respect to the case management deadlines.”).

13 **2. CyWee and STM, Inc. Will Not Be Prejudiced by HTC’s Proposed Schedule**

14 The Ninth Circuit has made clear that prejudice to non-moving parties is a secondary
 15 consideration in evaluating whether good cause exists to modify a case schedule. *See Johnson*,
 16 975 F.2d at 609 (“Although the existence or degree of prejudice to the party opposing the
 17 modification might supply additional reasons to deny a motion, the focus of the inquiry is upon
 18 the moving party’s reasons for seeking modification.”). As HTC has diligently sought to serve
 19 STM N.V. and CyWee Motion, was diligent in requesting an amendment to the Scheduling
 20 Order, and had good reason for doing so, these factors outweigh any potential prejudice to
 21 CyWee and STM, Inc., and good cause exists to amend the Scheduling Order.

22 Even if prejudice alone were enough to preclude a finding of good cause—it is not—
 23 CyWee and STM, Inc. will not be unfairly prejudiced by the schedule the HTC has proposed. As
 24 an initial matter, the proposed schedule would apply equally to HTC. Furthermore, HTC has not
 25 proposed to extend the trial date, nor any dates following the close of discovery. Most
 26 importantly, however, HTC’s proposal to amend the Scheduling Order is simply a request for
 27 sufficient time to serve requisite parties, and an attempt to afford as many parties as possible the
 28

1 opportunity to participate in claim construction proceedings, which may have binding
 2 consequences on those very parties. As such, prejudice considerations, insofar as they are
 3 relevant to the evaluation of good cause, weigh in favor of adopting the schedule that HTC has
 4 proposed.

5 **IV. CONCLUSION**

6 For the foregoing reasons, HTC respectfully requests that the Court amend its Scheduling
 7 Order in the manner that HTC has proposed.

8 Dated: March 30, 2018

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CYWEE GROUP LTD.,

11 CASE NO.: 2:17-cv-00932-JLR

12 Plaintiff,

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14 HTC CORPORATION, and HTC AMERICA,
15 INC.,

16 Defendants,

17 [PROPOSED] AMENDMENT TO
18 SCHEDULING ORDER

19 HTC CORPORATION, and HTC AMERICA,
20 INC.,

21 Third-Party Plaintiffs,

22 v.

23 STMICROELECTRONICS N.V.,
24 STMICROELECTRONICS, INC., and CYWEE
25 MOTION GROUP LTD.,

26 Third-Party Defendants.

1 This matter comes before the Court on Defendants and Third-Party Plaintiffs HTC
 2 Corporation and HTC America, Inc.'s Motion to Amend the Scheduling Order as provided in the
 3 December 14, 2017 Minute Order Setting Trial Dates and Related Dates (D.I. 42) ("Scheduling
 4 Order"). This Court, having reviewed the relevant motions, pleadings, and papers on file, hereby
 5 enters the following ORDER:

6 Good cause appearing, Defendants and Third-Party Plaintiffs' Motion to Amend the
 7 Scheduling Order is GRANTED in its entirety. Accordingly, the Court hereby adopts the
 8 following amended case schedule:

Event	Date
HTC's Deadline for Service of Summons and Third-Party Complaint	October 11, 2018
Joint Claim Chart and Prehearing Statement	July 27, 2018
Opening Claim Construction Briefs	August 2, 2018
Responsive Claim Construction Briefs	August 16, 2018
<i>Markman</i> Hearing (9:00 AM)	September 21, 2018 (Subject to the Court's availability)
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Trial Briefs, Proposed <i>Voir Dire</i> Questions and Jury Instructions	March 18, 2019
Trial (7-8 days)	March 25, 2019

Except as otherwise specified by this Order, all provisions of the December 14, 2017 Scheduling Order shall remain the same.

IT IS SO ORDERED.

Dated this _____ day of _____, 2018.

The Honorable James L. Robart
United States District Court Judge

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